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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

UNITED STATES OF AMERICA, PETITIONER,

v.

APPALACHIAN ELECTRIC POWER COMPANY,
RESPONDENT.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

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PRELIMINARY STATEMENT

SCOPE OF THIS BRIEF

Virginia has joined with North Carolina and thirty-seven other States, *amici curiae,* in a brief in which is discussed those questions more or less common to all of said States. It is not intended here to repeat the arguments made in that brief, but to discuss principally certain questions more peculiarly applicable to Virginia in which the project under con-

sideration is located, and a few additional questions not therein touched on.

The respondent, Appalachian Electric Power Company, has also filed an elaborate brief in which the decisions of this Court pertaining to the questions of navigability and the jurisdiction of the United States over streams, navigable and non-navigable, are so exhaustively reviewed that it would but impose an undue burden on the Court to undertake here a similar general discussion of these cases. Respondent's brief also contains an analysis, in complete detail, of the evidence respecting the factual questions of navigability of New River and the effect of the hydro-electric project on navigation in the Kanawha River. Virginia respectfully asks leave to adopt these portions of respondent's brief, in order to avoid a repetition of the arguments there made.

STATEMENT

This suit is the outgrowth of a Declaration of Intention to construct, operate and maintain the Radford project, a hydro-electric generating plant located in New River, a Virginia mountain stream, which was filed by a predecessor and assignor of respondent with the Federal Power Commission on June 26, 1925. From the very beginning Virginia has protested against the assumption of jurisdiction over the project by said Commission. At the only public hearing on the declaration ever held by the Commission, on March 2, 1926, the late John R. Saunders,

then Attorney General of Virginia, filed a written protest and also appeared in person. He called attention to the fact that "Virginia, unlike many other States in this Union, has still maintained and reserved to itself, for the benefit of all citizens of that Commonwealth, the beds and shoals of the rivers and streams which go through that State." (Gov. Ex. 100, R. pp. 2584, 2600-2602.)

The position there taken has been consistently maintained in all court proceedings involving the Commission's jurisdiction, Virginia having appeared in all of them as *amicus curiae*.

On March 5, 1940, the day following the granting of this certiorari, the General Assembly of Virginia unanimously adopted a resolution as follows:

SENATE JOINT RESOLUTION NO. 83

Whereas, the Federal Power Commission, a regulatory agency of the United States, has asserted in the Federal Courts, in a suit instituted by the United States against the Appalachian Electric Power Company, that it is possessed of plenary jurisdiction and powers to regulate the construction and operation of, and ultimately to recapture the ownership of, an electric water power plant of said company on New River, near Radford, Virginia; and,

Whereas, said plant was constructed pursuant to authority conferred on said Company by a license issued to it by the Virginia State Corporation Commission in conformity with Virginia statutes relating

to and regulating the construction and operation of such power plants; and,

Whereas, the conditions sought to be imposed by the Federal Power Commission on Virginia's said licensee are so burdensome that, if generally applied to Virginia waters, they will completely annul the legislative policy of this Commonwealth to encourage the development of her water powers; and,

Whereas, the United States District Court for the Western District of Virginia and the United States Circuit Court of Appeals for the Fourth Circuit (by a two to one decision) have both sustained the jurisdiction and power of Virginia to regulate said plant on New River, but the United States has decided to carry said case to the United States Supreme Court;

Now, therefore, Be it resolved by the Senate of Virginia (the House of Delegates concurring) as follows:

1. That the Commonwealth of Virginia considers the development of her water powers a matter of State concern only and one within her exclusive jurisdiction to regulate.

2. That the regulation by Virginia of her water powers, free from burdensome restrictions having no substantial relation to navigation in interstate commerce, is of vital importance to the interests of the Commonwealth.

3. That the General Assembly of Virginia is of opinion that the jurisdiction to exercise the said powers asserted by the United States over Virginia's

streams was not conferred on the United States by the United States Constitution and can be conferred only by an act of the General Assembly of Virginia ceding such jurisdiction to the United States.

4. That the Commonwealth of Virginia has not only not ceded such jurisdiction or consented to the exercise by the United States of such jurisdiction, but has protested against same before the Federal Power Commission from the beginning, and also in the courts at all times, and does now still further protest against same.

5. That the development of Virginia's water powers is not a matter of national concern, but a problem of the State which this Commonwealth is fully competent and able to administer and regulate and is properly administering and regulating through her State Corporation Commission, and no facts exist which provide any basis, reason or necessity for Federal intervention in relation to same, except to the extent such development may affect interstate navigation.

6. That the Attorney General of Virginia, Honorable Abram P. Staples, be, and he hereby is, requested to file a petition for leave to intervene in said suit in the Supreme Court of the United States as a party defendant, and, if such leave be not granted, then to take all possible action in said suit, as *amicus curiae,* to sustain the exclusive jurisdiction of the Commonwealth of Virginia over her streams in all matters not substantially related to navigation in interstate commerce."

Pursuant to that resolution a motion to intervene as a party was made in this Court by the Attorney General of Virginia. This motion was denied on April 1, 1940, but "with permission to file a brief and participate in oral argument as *amicus curiae*." Thereupon the States of Virginia and West Virginia (through which New River also runs) made a motion for the continuance of the cause, which was granted on April 8, 1940, and the case assigned for argument on Monday, October 14, next.

THE BROAD CONSTITUTIONAL QUESTIONS PRESENTED

The broad constitutional questions presented, in so far as the Commonwealth of Virginia is concerned, are:

1. Does the Congress possess the exclusive constitutional power to regulate through a commission the construction and operation of a hydro-electric generating plant in respect to matters having no relation to navigation, (a) when constructed in Virginia waters navigable in interstate commerce, and (b) when constructed in such waters not so navigable.

2. Does the Congress possess the constitutional power to take, without compensation, Virginia's property rights in the bed of such a stream and the usufruct of the stream flow?

3. Does the State of Virginia possess the exclusive power to regulate the construction and operation of such plants, except to the extent that they affect navigation in interstate commerce?

THE ATTITUDE OF VIRGINIA

Virginia's protest against the Federal Power Commission's jurisdiction over her streams is not motivated by any desire to hamper or restrict the activities of the Federal Power Commission within its proper sphere, nor is there any intention on the part of the State to free the respondent company from proper governmental supervision and regulation. On the other hand, the State has provided its own agency, the State Corporation Commission, and vested it with ample powers and imposed on it the duty to regulate the respondent's activities, both in the manufacture of electric energy, and in its distribution and sale. This regulation Virginia intends shall be efficiently and effectually conducted. The respondent's manufacture of electric energy in Virginia is by no means confined to the project here involved. On the contrary, the respondent possesses other plants operated by both steam and water power. The electrical energy generated in these various plants is fed into the respondent's single distribution system, and all is blended and integrated into one general activity. To segregate one part of this whole for Federal regulation, while the remainder is regulated by the State must necessarily result in a confused, if not a chaotic condition. It would seem to be very difficult, if not impossible, for the Federal Commission to ascertain the profits derived from the New River project under such circumstances, or for the State Commission to find a suitable basis for regulation of the other plants, or the distribution system or the business as a whole, including rates.

Furthermore, the generation of electrical energy

constitutes, in itself, an independent field of governmental regulation. The manufacture of such energy has been clearly established by the unvarying decisions of this Court to lie within the sphere of State control, just as other manufacturing enterprises. Federal regulatory jurisdiction in this field has been expressly limited by the Constitution, as construed by this Court, to regulatory measures, *negative in character,* deemed necessary to *protect from injury* other transactions which are themselves interstate in character. This was the basis of the decisions in the National Labor Relations Board cases. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, *Consolidated Edison Company* v. *National Labor Relations Board,* 305 U. S. 197. In this last named case the company did not sell any electricity at all in interstate commerce, but Federal jurisdiction to prevent a shutdown because of threatened labor disputes was sustained because of the effect such an interruption of service would have on railroads and other interstate activities dependent upon the Edison Company for power in order to operate.

Virginia, therefore, regards with genuine apprehension the persistent efforts of the Federal Power Commission to invade this manufacturing field and to draw such an activity into its affirmative regulatory jurisdiction. While the supremacy of the Federal Government in its own proper sphere, as delineated in the Constitution, is cheerfully conceded, yet just as earnestly does Virginia insist upon the supremacy of her own government in its proper field

as established by that instrument. Since the foundation of our Government, the regulation of manufacture has been considered by all to be within the exclusive jurisdiction of the States, and has been regarded as solely within their police powers.

Naturally, the mere advocacy by the Solicitor General before this Court of such a radical departure from established beliefs and principles has caused consternation among the Attorneys General of *five-sixths* of the States and they have filed briefs in opposition thereto. If manufacturing and everything "affecting" interstate commerce is to be drawn within the orbit of Federal power to the exclusion of any State voice therein, there will no longer remain any useful civil function which the State Governments can perform.

It is Virginia's view that it was the intention of the Constitution that the State and Federal Governments together should occupy the entire field of government, that each should have its respective sphere therein and be complementary of the other. That after all, they are partners in government with a single end and common purpose, and there should exist between them a cheerful and cordial spirit of cooperation to the accomplishment of the greatest good. That changing conditions make necessary, from time to time, readjustments of their spheres of activity. But, that the Commerce Clause of the Constitution should be used as an instrument of destruction, of all State regulatory powers over domestic business, was never intended by the framers of the Constitution and is not justified by existing conditions.

Such a result is appalling to contemplate, yet the Solicitor General's arguments necessarily lead to that result.

The exercise by Virginia and the other States of their police powers and other reserved powers has universally been regarded as a right retained under the Constitution and never surrendered. The Solicitor General's argument leads to the conclusion that these powers may be exercised by the States, not as a matter of right, but only by Congressional grace, in any matters "affecting" interstate commerce, which means all business matters of any importance, because all such do "affect" interstate commerce.

The attitude and position of Virginia in this case is, therefore, that, while she is anxious to cooperate with the Federal Government to the end that her people, as well as those of other States, may be well governed jointly by both governments, she does not feel that this end will be served by such a revolutionary and chaotic change in their basic structures as is here advocated by the Federal Power Commission. She is constrained, therefore, to file this brief in protest against any such expansion of Federal jurisdiction and the consequent diminution of that of the States. This Virginia conceives to be her duty and she is not unmindful of the fact expressed by the then Governor of New York, Honorable Franklin D. Roosevelt, in his second inaugural address, in these words:[1]

"When States become indifferent to their

[1]The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 1, p. 98.

duties, the natural tendency is for the National Government to grasp for more power."

Pertinent also is a statement made on May 9, 1928, in a House debate by Honorable Cordell Hull, then representative from Tennessee. In discussing certain unauthorized powers attempted to be exercised by Congress over State streams, based solely on the right to regulate navigation, Mr. Hull said:[2]

> "Under this naked right, *with no power given to use the water for any other purpose than navigation,* Congress has drifted along without any challenge by the States, *they being asleep,* and has naturally gone a little too far in some of the special acts that have been passed." (Italics supplied.)

THE INTERESTS OF VIRGINIA IN THIS CASE

A. *Property Interests*

The fourth finding of fact made by the District Court is as follows:

> "The bed of New River at the site of the project is owned by the State of Virginia and all lands adjacent to the river which will be affected by the project have been acquired by and are now owned by the defendant." (R. p. 154.)

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[2]Cong. Rec. Vol. 9, pt. 8, p. 8222.

Virginia's ownership of the bed of the stream is not challenged by the petitioner, and it is, therefore, unnecessary to refer to the various statutes and decisions applicable. In view of such ownership, no riparian owner may lawfully construct a dam on such property of the State without permission of its legislature. But the vast water powers of State streams, having been going to waste from time immemorial, and being readily susceptible of useful development, in 1928 the Virginia legislature took cognizance of the deplorable situation, and gave careful consideration to the adoption of measures to encourage the utilization of these water powers for the benefit of the people of the State. It seemed almost a crime that these natural resources of the Commonwealth should be permitted to lie dormant if it were possible for the State to do something to utilize them. It was realized that, unless the State was to depart from her established policy of refraining from engaging in competition with private industry by developing these water powers as governmental activities, inducements must be held out to encourage their development by private capital. It was further found that fear of being harassed by future legislation and of undue governmental interference in the operation of water power projects operated as a strong deterrent to private developers. In order to correct this situation, the 1928 Virginia Water Power Act was passed and later amended in 1932 [Acts 1928, p. 1099; Acts 1932, p. 684; sections 3581(1)-3581(16) Michie's 1936 Code.] The purposes of the statute are therein declared to be "to encourage the utilization of the water resources in the

State to the greatest practicable extent and to control the waters of the State, as herein defined, and also the construction or reconstruction of a dam in any rivers or streams within the State for the generation of hydro-electric energy * * *."

The inducements offered by the statute to private investors include a fifty-year license, and thereafter an indeterminate license to continue only until the property is purchased or acquired by the State. The license confers the right to use "the natural resources owned by the State," such as the stream flow and beds of streams. While the State reserves the right to acquire the property by condemnation at any time, the methods prescribed for ascertaining the value and amount to be paid the prospective investor are fair and reasonable.

On the other hand, the statute vests in the State Corporation Commission appropriate powers to regulate the types of dams and other improvements and the methods of their operation, and to require that the stream flow be not injuriously interferred with by the construction or operation of the property. Under other statutes, the State Corporation Commission is empowered to regulate rates for electric power, as well as other matters relating to the conduct of the business. [Michie's 1936 Code Sections 4065(a), 4066.]

The Commonwealth of Virginia considers her laws, with respect to the control of her water powers, both fair to the prospective investor and at the same time adequate to protect the public interests.

After proper investigation, the State Corporation

Commission granted the respondent Appalachian Electric Power Company's application for a license to construct the dam and power plant here in controversy, and but for the assertion by the Federal Power Commission of its control over the project, the plant would no doubt have been in operation many years ago.

Although Virginia has granted a license to the respondent company to operate its project under proper State regulation and control, nevertheless the State continued to own the stream and its bed, which includes, of course, the latent, as well as utilized, water power therein. This was the view repeatedly expressed by Governor Franklin D. Roosevelt, of New York. In a message to the legislature on March 12, 1929, he said:[3]

> "For a generation the need for power for industrial and domestic purposes has been steadily increasing, and during this period *the ownership by the people of the State of New York* of a vast potential source of energy in their portion of the waters of the St. Lawrence River has received increasing public attention.
>
> "In the past the actual necessity for the development of this potential energy has not been wholly clear but in more recent times the great preponderance of informed opinion recognizes the immediate need for action.

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[3]The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 1, pp. 171-2.

"The State owns or controls other much smaller water-power rights but it seems to me best at this time to focus recommendations and public attention on the development of the St. Lawrence River.

"In making use of this potential energy on the St. Lawrence *owned by the people of the State,* the objective of the problem is essentially this:

"1. The physical transforming of falling water into electrical current.

"2. The transmission and distribution of this current from the plant where it is developed to the industries and homes of the people of the State.

"As this St. Lawrence power source *is the property of the people of the State,* we can, I think, all agree to the principle that the actual energy therefrom should be, for all time, under the immediate control of the people of the State and should be transmitted and distributed to the people of the State at the lowest practical cost." (Italics supplied.)

Similar assertions of State ownership occur repeatedly in Governor Roosevelt's public statements.[4]

Subsequent statements of President Roosevelt, as late as December, 1936, show that in discussing the proposed St. Lawrence treaty with Canada it was con-

[4] Id. pp. 82, 91, 163, 164, 167-170, 176, 178, 181, 186, 204.

templated that the power should be developed by the Power Authorty of the State of New York.[5] But the position taken by the petitioner here not only ignores but would completely nullify these valuable property rights of Virginia. Virginia also has valuable property rights in other streams, the development of which is being obstructed by the cloud cast by the Federal Power Act over her jurisdiction with respect to their development. Among these is the James River above Richmond, which, though not as wild a stream as New River, is utterly useless for navigation. It is believed that these streams will be devoted to useful development if Virginia is left free to encourage same.

Effect of Petitioner's Contentions on Virginia's Property Rights

An examination of the petition for certiorari and of petitioner's brief filed in the above entitled cause discloses that this Court is asked, with regard to waters where there is involved no public land nor any other Federal property:

(1) To hold in practical effect that Virginia's water powers, whether on navigable or non-navigable streams, may not be developed or utilized by the State, or under her jurisdiction and authority, but instead may be developed only if such development meets the approval of the Federal Power Commission and, if so, then only pursuant to the acceptance of a Fed-

[5] Id. Vol. 3, p. 40; Vol. 5, p. 123.

eral license containing numerous burdensome restrictions upon the utilization of such water powers, which restrictions are in conflict with the policies adopted by the State of Virginia for the conservation, regulation and development of her water resources.

(2) To hold that the water powers of Virginia may be developed only, if at all, under a Federal license which would have the effect of vesting in the United States, rather than in the State, ultimate reversionary or residual proprietary rights therein and the exercise of local police powers over and in connection with such projects and their operation, and even of providing for the regulation of intrastate rates for electricity, developed and sold from such water resources within the State, in the absence of State regulation.

(3) To hold that the United States may, as a condition to permitting the development of Virginia's water power resources, whether on navigable or non-navigable streams, compel the developers (duly authorized by the State) to accept a Federal license which would give the United States a contractual right to take over the power development at the end of the Federal license period upon payment to the developer of the "net investment" (as determined by the Federal Power Commission and subject to numerous Federal statutory deductions) or its then fair value, whichever is the less, with the consequent appropriation of Virginia's property rights in the streams.

(4) To hold that Virginia's water power resources

may be developed only under plans and conditions which "in the judgment of the (Federal Power) Commission will be best adapted to a comprehensive scheme * * * of water power development and of other beneficial public uses" [16 USCA 803(a)], in complete derogation of the sovereign right of the State to authorize, regulate and control the development of her streams for water power, recreational and other purposes as she deems for her best interests (subject only to the admittedly constitutional requirement that there be no interference with interstate or foreign commerce).

(5) To hold that the development of Virginia's water powers, even on non-navigable streams, may be made only in accordance with the regulations of the Federal Power Commission with reference to renewals, replacements and depreciation reserves and under "such rules and regulations as the (Federal Power) Commission may from time to time prescribe for the protection of life, health and property" [16 USCA 803(c)], all in complete disregard of the rights of the State in her streams.

(6) To hold that Virginia's water power resources may be developed only subject to the regulation of amortization reserves, determination of net investment, payment of fees to the United States and expropriation of excess profits by the United States, as determined by the Federal Power Commission, all in disregard of the rights of the State [16 USCA 803(d), (e)].

(7) To hold that the United States may prohibit the development of Virginia's water power resources, whether on navigable or non-navigable streams, unless the developer enters into a contract to permit the United States to "take over" such water power development for less than the fair value at the time of taking, with the result of greatly impeding, or even nullifying, the development of said water resources and, in practical effect, permitting the Federal Government to enter the domain of the State for the purpose of engaging in a business or industry, in excess of the constitutional authority of the United States and in violation of the sovereign rights of the State.

(8) To hold that, in complete disregard of Virginia's rights and policies, her water power resources may be developed only after receiving the approval of the Federal Power Commission and only upon plans which that Commission deems best adapted to develop, serve and utilize in the public interests the water resources of the region (16 USCA 800).

Furthermore, subsection (d) of section 797 makes it clear that any State or municipality which might desire to develop the water powers of the State is subject to the same license requirements and burdens (except, under section 803, as to annual charges for power not sold at a profit and except as to certain projects designed to improve navigation) as are imposed upon private licensees, while section 817 makes it unlawful for a State or municipality to build a power dam, in any waters subject to the jurisdiction of the Commission, without procuring the required permit or

license from the Power Commission. *Thus, Virginia herself is prohibited by this statute from developing her own water powers as a governmental undertaking except with the consent and under the directions of the Federal Commission.*

It is clear from the foregoing summary of the burdensome provisions of the Federal Water Power Act that, if valid and if construed as petitioner contends, the Act amounts to a virtual prohibition of the development of Virginia's own property interests in her streams, either by the State herself, by her municipalities or by private investors licensed by the State to develop her said property interests.

B. *Removal of Sources of Taxation*

If the Federal Government should be held to possess the constitutional power to acquire and operate the hydro-electric plant here involved, disassociated from the function of regulating navigation, it would be predicated upon the further holding that such an activity is a *governmental function,* in which case the Congress is empowered to exempt from State taxation the governmetal agency through which the function is performed. *Graves* v. *New York,* 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21. If the Federal Government may operate industrial plants of this type as an essentially governmental function, there is no reason why it may not extend the field indefinitely. The disastrous results to the State's revenues which would follow from such tax exemptions is obvious. It was

vividly pictured by this Court when considering the effect on Federal revenues of exempting State proprietary activities from Federal taxation in the case of *State of South Carolina* v. *United States,* 199 U. S. 437. In holding that the operations by a State of a liquor dispensary was the exercise of a proprietary and *not a governmetal function,* this Court said:

> "The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co.* 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow, and the whole body of internal revenue tax be thus stricken down.
>
> "More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed 'public utilities,' including not merely therein the supply of gas and water, but also the entire railroad system. Would the state, by taking into possession these public utilities, lose its republican form of government?
>
> "We may go even a step further. There are

some insisting that the state shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any state, how much would that state contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

"Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in

> this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government. * * *" (199 U. S. 437, 454-5.)

This reasoning applies equally to the condition the States may be confronted with if proprietary activities of the Federal Government are held to be essentially governmental. The above case was recently reaffirmed in *State of Ohio* v. *Helvering*, 292 U. S. 360.

It cannot be doubted, therefore, that the principles advocated by petitioner in this case constitute a real threat to the independent existence of the State governments.

C. *Effect on Virginia's Sovereign Powers*

Manufacturing activities have heretofore been uniformly regarded as local or internal affairs of the State, subject to exclusive regulation under the State's police powers. This power of regulation and control of such industries is indispensable to the proper functioning of efficient local government. The principles advocated by petitioner would expand the application of the Commerce Clause so as to bring the regulation of all industries "affecting" interstate commerce within the exclusive Federal jurisdiction. The obvious effect would be the substantial destruction of nearly all useful civil functions now performed by Virginia under her police powers. Every business activity of any importance necessarily "affects" interstate commerce in some degree.

Virginia is vitally interested, therefore, in preserving the integrity of her sovereignty.

THE QUESTIONS PRESENTED

Petitioner's brief (p. 2) states the questions presented briefly, as follows:

1. Is New River, at the site of the project, navigable in interstate commerce?

2. If not, (a) will the project obstruct navigation in other navigable waters, or (b) will it affect the interests of interstate commerce within the meaning of section 23 of the Federal Power Act?

3. Are the licensing provisions of said Act, which have no relation to regulation of stream flow or navigation, constitutional under the Commerce Clause, (a) if the project is located in waters navigable in interstate commerce, or (b) if located in waters not so navigable?

As stated at the outset, the facts involving navigability and the effect of the project on navigation in other waters so clearly appear in the concurring findings of both lower Courts, and are so fully discussed in respondent's brief, that they will not be again argued here. Most of the constitutional and other legal questions, and the relevant authorities have been discussed at length in the brief, *amici curiae*, of North Carolina, Virginia and thirty-seven other States. What is said here on these questions is intended to be supplemental to that discussion, as well as to the argument

contained in respondent's brief, and will avoid, so far as possible, any repetition of the matter contained in that brief or in the brief of respondent. This brief will undertake to maintain the following propositions:

I.

Virginia and the United States each enjoys in this Court an equal status, and there is no presumption that the attempted exercise by either government of a power conflicting with one attempted to be exercised by the other, is constitutional or proper.

II.

Though the evidence does not support the petitioner's claim that New River was navigable in interstate commerce a half century or more ago, yet, even if it did, such fact alone would not confer perpetual jurisdiction on the Federal Government to regulate interstate navigation in the stream where there is no such navigation now in said stream and no reasonable possibility that there ever will be any such navigation therein to regulate.

III.

The Federal Government's power to protect navigable waters in interstate navigable streams is itself implied from the power to regulate interstate commerce, and it cannot be made the basis of inferring any additional regulatory power the exercise of which does not constitute a regulation of interstate commerce.

IV.

Regulation of the manufacture of electric energy in the manner provided for by the Federal Power Act is not a regulation of interstate commerce, and the exercise of any such power by the Federal Government, over the protest of the State in which the plant is located, if sustained under the Commerce Clause, would amount to a destruction of the dual system of American Government as established by, and in violation of, the United States Constitution.

V.

The provisions of the Federal Power Act which authorize the Federal Government to take over the property of Virginia, consisting of the bed of the river and the usufruct of the stream flow, without compensation to the State, violate Article 4, Section 3, Clause 2, as well as the Fifth Amendment of the Constitution.

VI.

Even if the Federal Government had the power to regulate the manufacture of electrical energy, the proposed Federal regulation of the construction and operation of *hydro-electric* generating plants, where there is no such regulation of plants operated by steam, is arbitrary and unreasonable, is not based on any proper classification, and would result in needlessly confusing the efforts of Virginia to regulate the industry as a whole.

VII.

Virginia is entitled to a decision now on the constitutionality of the capture clause, as well as the other license provisions of the Act so as to enable her to proceed with the development of her many valuable streams.

SUMMARY OF ARGUMENT

I.

In determining the constitutional validity of Federal statutes which involve a conflict in the exercise of State and Federal jurisdiction or powers, the general rules of law to be applied must necessarily be essentially different *in cases where the State appears and asserts the possession of the disputed jurisdiction* from cases where a *private litigant alone* undertakes to claim that such jurisdiction resides in the State. In the case at bar, it appears that both the Congress and the Virginia legislature have enacted statutes each asserting jurisdiction in their respective governments to regulate the generation of electricity in waters navigable in interstate commerce. The petitioner relies on the Federal statutes while the respondent relies on those of the State. Under the rule ordinarily applicable to a private litigant attacking them, there is a strong presumption in favor of the constitutionality of both statutes. The obvious result must be that the respective presumptions offset and nullify each other, as between the two governments themselves.

While the Federal Government enjoys supremacy

in the field of the powers delegated to it by the Constitution, the States enjoy a like supremacy within the field of their reserved powers, including the police power. In cases where there is disagreement between a State Government and the Federal Government respecting jurisdiction to exercise their respective powers in a particular field, it is the high function of this Court to determine the question. The argument which has been recently advanced by some that this Court should decide such a question in favor of Federal jurisdiction unless it is plain that such jurisdiction has been, or is sought to be, exceeded is unsound in principle. Any such rule would produce a succession of precedents sustaining diminutions of State jurisdiction and power which would gradually result in a complete destruction of the dual form of government. Furthermore, it would amount to a practical abdication by this Court of its most important function, *i.e.*, to preserve the continued existence of the form of government created by the Constitution.

While it is true that Article V of the Constitution empowers the legislatures of two-thirds of the States, on their own initiative, to require the calling of a convention to propose amendments to the Constitution, and thus preserve their powers and jurisdiction, this should not be considered as relieving this Court of the responsibility to avoid the necessity for resort to any such extreme measure, with the attendant possibility of serious curtailment of needful existing Federal powers. However, the fact that this power of amendment was conferred on the States is evidence of the scrupulous care exercised by the framers of the

Constitution to insure the continued existence of the dual form of government.

II.

Even if the evidence established (which Virginia denies) that New River a half century or more ago was a stream navigable in interstate commerce, this fact alone would not have the legal effect of bringing the stream within the *perpetual jurisdiction* of Congress to regulate navigation therein, where it now appears that there is no reasonable possibility that this mountain stream will ever be useful or used as a highway in interstate commerce, and is not susceptible of such use. The rule stated in *Economy Light and Power Company* v. *United States,* 256 U. S. 113, relied on by petitioner, had reference to a river which, by Federal statute, had been perpetually preserved as a public highway. To apply such a rule to all State rivers as to which persons could be found to testify that some interstate use had been made thereof by generations long passed, would create an intolerable state of doubt and uncertainty as to the status of every State stream of any importance. While, under the evidence and findings below, this legal question may be regarded as unimportant in this case as to New River, yet Virginia's interests in the James River above Richmond, which by means of dams and locks was used in navigation in the early days, and other similarly situated streams, render this question of great importance in the development of these other streams.

Even petitioner does not contend that under modern

conditions, with improved highways, motor vehicles and railroads, there is any possibility that New River will or can ever be utilized as a highway of commerce. It is but employing a needless and useless, as well as a harmful, *fiction* to preserve Federal jurisdiction to regulate navigation in a stream where there is not, cannot and will not be, in fact, any navigation to regulate. Particularly is this true when the effect of the *fiction* is to hinder, delay and obstruct the States in the development of their water resources, and create doubt and uncertainty as to the status of streams. Legal fictions are invoked only to accomplish a worthy purpose, not to create harm, uncertainty, doubt and confusion. Therefore, even if the stream had been used in interstate commerce fifty or more years ago, this fact would not give Federal jurisdiction over the stream after possibility of such use has long since vanished.

III.

The Federal Government's power to protect waters navigable in interstate commerce is itself an implied power, inferred from the power to regulate interstate commerce. Obviously a new power cannot be implied from that to protect navigable waters where the new power is not included in the power from which the first implied power is inferred. To imply any such new and different power would be to violate the ancient truism that "A stream cannot rise higher than its source." If the new power is not within the Commerce Clause itself, obviously it may not be in-

ferred from a power which itself is inferred from the Commerce Clause. The ultimate result of such a rule would necessarily be unlimited Federal power over every conceivable subject. The power to prohibit obstructions to navigable waters cannot, therefore, be made the basis for a regulatory power over electric generating plants, since this regulatory power is itself not within the Commerce Clause.

IV.

The generation of electrical energy is not interstate commerce, and the Federal Government is not empowered by the Commerce Clause to regulate its manufacture. Commerce does not begin until the manufacture ends, and the exclusive control of the manufacture resides in the State. *Utah Power & Light Company* v. *Pfost,* 286 U. S. 165, 181. The generation of power, even though closely connected with interstate commerce, is distinct therefrom and not a part thereof. It is in legal contemplation, as well as in fact, a local activity. *Coverdale* v. *Arkansas-Louisana Pipe Line Company,* 303 U. S. 604, 611.

But petitioner urges this Court to break down the dividing line between manufacture and commerce as established by past decisions. To do so, however, would be to so extend the Commerce Clause as to destroy substantially all the regulatory police powers of the States and render their governments capable of rendering little service or contribution to the dual system in the sphere of regulation. In fact, it would practically destroy our existing system of government.

The regulatory measures which the Federal Power Commission seeks to exercise over the New River plant, which Virginia objects to, have no relation to navigation in any waters anywhere. They embrace every detail of construction, maintenance and operation of the plant, and their exercise by thise Federal agency would necessarily supersede and exclude State regulation. The Solicitor General's assumption (p. 141) that the Federal Government may *arbitrarily* forbid the movement of the electric energy in interstate commerce is not only not sustained by reason or by the decisions of this Court, but a contrary principle has been established. Such a prohibition must be predicated on a reasonable and constitutional basis. *Hammer* v. *Dagenhart,* 247 U. S. 251, and cases cited therein. Furthermore, the Federal Power Act is not restricted in its application to plants sending the electric energy produced into interstate commerce. If this were the asserted basis of Federal jurisdiction and, if it were sustained as valid, the respondent would, no doubt, confine its distribution to Virginia. Or Virginia might so limit the use by her licensees of the power produced from her properties.

But even if the Federal Government did possess the power to arbitarily prohibit the distribution of the energy in interstate commerce, and if the Act based Federal jurisdiction on the power to prohibit such distribution, it is undoubtedly true that Virginia possesses the absolute power to prohibit the construction of the plant on her river beds. Therefore, aside from Virginia's police power, her property interests entitle her to control the project except in so far as

same might interfere with interstate commerce. And this principle likewise applies to petitioner's argument that the Federal power *to prohibit the construction of such a plant in navigable waters* carries with it the power to impose, upon constructions permitted therein, arbitrary conditions unrelated to navigation. Virginia also owns the beds of *navigable* streams and may prohibit such constructions, except those related to navigation. *James* v. *Dravo Contracting Company,* 302 U. S. 134, 147.

But the Federal power to prohibit constructions in navigable waters is merely the power to protect such waters from obstructions. It would be an abuse of that power to refuse consent to the use by the State or her licensees of such waters in such a manner as not to obstruct or interfere with navigation. Concededly, to be sure, the Federal Government has exclusive jurisdiction to *determine* whether a structure is harmful to navigation. But, once it is decided that it is *not* harmful, it is difficult to perceive any principle which would sustain that Government's power to forbid the structure. The real power is to prevent *obstructions* to navigation, *not* harmless or beneficial improvements in the stream. Petitioner's position, in its final analysis, is that *the power to decide what is harmful,* which is in the nature of a judicial power, may be availed of to take away from the States their jurisdiction over the harmless or beneficial structures. It is apparent that such an abuse of a mere power to decide a question would constitute a palpable invasion of State sovereignty and a violation of the reserved powers of the States.

The only power which the Federal Government possesses over *waters* navigable in interstate commerce, which it does not possess over *all the lands* of a State, is the power to regulate, protect and control navigation in said waters. Other actions in these waters, which have no substantial relation to navigation, are internal concerns of the State. In fact, the Federal Government has the identical jurisdiction and power *to prevent acts on land, as well as on water,* where such acts obstruct or interfere with navigation or interstate commerce. *United States* v. *Coombs,* 12 Peters (U. S.) 72, 78, 9 L. ed. 1004, 1007. It would seem that the Federal Government possesses the like power to decide whether any structure *on land* obstructs navigation or commerce, and, if so, to prohibit same. It might be contended with equal plausibility that it can annex similar conditions to a decision not to prohibit a structure on land, even though not located anywhere near a stream of any kind.

The mere fact that rivers which cross State lines may present problems involving the interests of two or three States, does not bring the regulation of hydroelectric plants within the Commerce Clause. The Constitution provides two methods for solving such problems, first, by compacts entered into with the consent of Congress between the States interested; and, second, where the States are unable to reach an agreement, this Court alone has jurisdiction to decide as to their respective rights and interests. *Hinderlider* v. *La Plata Company,* 304 U. S. 92. Certainly it has never been contended that, because there may be disagreement between two or three States as to their re-

spective rights in a stream, this entitles the Federal Government, through a commission, to take over control of it. The proper and only function of the Federal Government in such a case is to settle the dispute through its judiciary department as has always been the practice. Nor can a possible dispute between a few States convert the problem into a national one, as petitioner contends, so as to entitle the Representatives in Congress from forty-eight States to participate in its solution. Nor does petitioner suggest the particular provisions of the Constitution which, it claims, confers on Congress the power or jurisdiction over every so-called "National Problem." But, be that as it may, a specific problem of this nature, involving only a few States, is not a "National Problem."

Furthermore, it is significant that all the States interested in the New River and Kanawha River, beginning with North Carolina, in which the stream rises, have filed briefs, *amici curiae,* protesting against extending Federal jurisdiction over the stream.

Petitioner's atteempt to justify the licensing and capture provisions of the Power Act on the ground that it might have some relation to flood control is not supported by any provisions of the Act.

V.

The scheme of the Federal Power Act is obviously to compel the setting aside, by the lessee, during the fifty year term of the lease, of amortization reserves sufficient to retire the investment of the lessee; that is, to empower the Federal Power Commission to

make the project a self-liquidating one. Thus, under the terms of the Act, if administered in this manner, the Federal Government would be empowered to take over the ownership and operation of the project, plant, and the bed and usufruct of the stream without any outlay or payment to the lessee or to Virginia. This procedure for acquiring Virginia's property rights clearly amounts to an absolute confiscation and taking of property without any color of authority therefor. This constitutes a clear violation of the Fifth Amendment. *Wayne County* v. *U. S.*, 252 U. S. 574.

Furthermore, the generation of electrical energy is a proprietary, not a governmental function, unless the energy is generated as a mere incident to the exercise of a governmental function and is in the nature of a by-product resulting from such exercise. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. The Federal Government is without power to engage in a proprietary activity, yet the Federal Power Act does not restrict its application to cases where the hydro-electric plant is but an incident to the exercise of an essentially governmental function.

The capture provisions of the Act, therefore, not only provide for the taking of Virginia's property without condemnation proceedings in a court of competent jurisdiction and without compensation, but authorize the Federal Government to engage in the proprietary business of generating and distributing electrical energy. Such provisions of the Act are clearly in violation of the property clause of the Constitution. Article IV, Section 3, Clause 2.

VI.

Even if the Federal Government had the power to regulate the generation of electrical energy, Virginia's system of regulating the operation of electric power utilities recognizes no distinction between hydro-electric and carbo-electric generating plants, or as to the principles governing rate charges.

The Federal Act, however, arbitrarily imposes enormous burdens on hydro-electric activities which place them at a distinct disadvantage in contrast with steam plants, which are not under Federal regulation at all. The effect has been to seriously obstruct the development of Virginia's water powers, and completely reverse the policy of encouraging same which Virginia's legislature adopted many years ago.

The regulation of *part* of an electric power company's activities, including rates and other matters, by the Federal Commission and *part* by the State Corporation Commission where their several products are blended into one distribution system obviously complicates and confuses the efforts of the State agency to fix fair and just rates for the whole system or otherwise regulate same. Many questions arise which are most perplexing. Is a different rule of valuation to be applied to the two types of plants, and, if not, is the State Commission to follow the Federal or vice versa? How is the distribution cost to be allocated as between the two types, when the time of day the power is supplied by each greatly effects the value of such power? May the Federal Commission, by the rule it applies for amortization

reserves, lay an undue burden on the other plants and as well on the distribution system of the licensee? These are but illustrations of the many problems needlessly created by the regulatory jurisdiction and powers asserted by the Federal Commission.

The only alleged basis for any such radical classification of these two types of generating plants is that the water power plant is claimed to have some relation to interstate navigation. Of course, if the Federal Commission's regulatory activities were confined to those features of the hydro-electric plant which have any reasonable relation to navigation, such as regulation of stream flow, Virginia would cheerfully concede the Federal jurisdiction in that respect. But the mere fact that the method of regulating stream flow might affect navigation furnishes absolutely no basis for applying to other features of water power development not affecting stream flow a different type of regulation from that controlling plants operated by steam. This classification is utterly arbitrary and unreasonable and without any rational basis.

VII.

An immediate decision of the constitutional questions here involved is imperative. The uncertainty of the status of the jurisdiction of the States over their rivers, both navigable and non-navigable, renders it so. These constitutional questions are directly raised by the pleadings in this case and are squarely

presented on the record. While the purpose of the Water Power Act was allegedly to protect and conserve the States' water powers, exactly the opposite has been the effect. The development of the latent power in the streams has been retarded and obstructed by reason of burdensome requirements and much of this natural resource has been going to waste for over twenty years as a result of this Federal legislation. Virginia, as well as the other States desiring same, should be free to encourage the utilization of this waste and thereby conserve their coal deposits which are being needlessly exhausted to generate electrical energy.

Immediately after the passage of the Federal Water Power Act there was a prompt protest from New Jersey that its provisions exceeded the Federal powers, and suit was instituted to have the Act declared unconstitutional. This Court held, however, that no justiciable controversy was presented, and declined to decide the question. *New Jersey* v. *Sargent,* 269 U. S. 328. The question is properly presented on this record, however, and the urgent public interest requires its decision.

ARGUMENT

I.

VIRGINIA AND THE UNITED STATES EACH ENJOYS IN THIS COURT AN EQUAL STATUS, AND THERE IS NO PRESUMPTION THAT THE ATTEMPTED EXERCISE BY EITHER GOVERNMENT OF A POWER CONFLICTING WITH ONE ATTEMPTED TO BE EXERCISED BY THE OTHER, IS CONSTITUTIONAL OR PROPER.

It is a very remarkable fact, in the development of the interpretation of the Constitution of the United States, that the great body of the decisions of this Court adjudicating the respective jurisdictions and powers of the State and Federal governments have been rendered in cases in most of which the States were not parties and did not even participate as *amici curiae*. The so-called "states' rights" have been in most instances sought to be interposed by private litigants as a shield to avoid the effect of what to them were undesirable Federal statutes, or have been attacked to avoid State statutes. The validity of many statutes has turned on the facts adduced in the records, but the States had no part in furnishing the evidence. This Court, therefore, in reaching its decisions on these most fundamental of all judical questions, has not had the benefit of the views and arguments of the States themselves. Furthermore, there have developed rules of presumptions of constitutionality, both of State and Federal enactments, which, while appropriate as between either government and a private litigant, cannot be justly or logically applied in a case where there is disagreement or conflict between the State and Federal govern-

ments themselves, concerning their respective powers and jurisdictions.

Then, also, there has grown up in the course of this litigation, conducted by private litigants, a doctrine that when acting within its delegated powers the Federal Government is supreme. This is not objectionable, because the same rule applies to the supremacy of the States in the exercise of their reserved powers over internal concerns. But efforts to extend this doctrine to the point where Congress is given the dominant right to determine and decide whether it or a State is possessed of jurisdiction to exercise a power in a particular field are obviously highly objectionable to the States. Virginia feels that she is entitled to, and will receive at the bar of this Court, equal consideration with the Federal Government, and free from any presumptions in favor of the latter's legislative enactments in conflict with hers. While this Court is itself technically a branch of the Federal Government, it was created by the States in Article III (Section 1) of the Constitution, and the jurisdiction conferred thereby (Section 2) contemplates that controversies between a State and the United States shall be decided by this Court. Certainly the States would not have committed their interests to this high tribunal if there had been any thought that the interests of the United States would be deemed paramount to theirs, or that there would be any presumption in favor of the validity of the exercise of a Federal power over that of a State. The application of any such presumption to cases like this would result in a series of decisions, each extending the

power beyond the former, which was itself based on a presumption of the validity of the exercise of the Federal power. The ultimate end would be a destruction of State powers *as a matter of right,* with the States exercising their powers *as a matter of grace* and only with the consent of Congress. This, of course, would be a complete reversal of the fundamental concept of the dual system, under which the States reserved their powers as a matter of right and themselves conferred on the Federal Government all the powers it possesses.

And the Constitution bears on its face conclusive evidence that the supremacy and independence of the States was intended to be perpetual. While Congress may propose, only the States may adopt amendments to the Constitution. Furthermore, if a situation should arise in which the States believe their rights have been invaded, they may initiate the calling of a constitutional convention to bring about any necessary amendments (Article V). Such a convention, held under circumstances involving resentment and bitterness at supposed Federal encroachments, would be most unfortunate, and might result in serious curtailment of Federal powers. But the vesting of this ultimate residual power in the States was obviously intended both as a warning against undue Federal encroachments, and as a final protection should the warning be ignored. It is interesting to note that the only curtailment of Federal power, since the foundation of the government,—the adoption of the Eleventh Amendment,—was brought about by the States as a result of the statement in the opinion of

Mr. Justice Wilson, who wrote one of the opinions in the case, that "Georgia is not a sovereign state." *Chisholm* v. *Georgia*, 2 Dallas 419, 457.

Virginia believes it to be the high function and duty of this Honorable Court to preserve the respective present existing fields of State and Federal powers and jurisdiction.

II.

THOUGH THE EVIDENCE DOES NOT SUPPORT THE PETITIONER'S CLAIM THAT NEW RIVER WAS NAVIGABLE IN INTERSTATE COMMERCE A HALF CENTURY OR MORE AGO, YET EVEN IF IT DID, SUCH FACT ALONE WOULD NOT CONFER PERPETUAL JURISDICTION ON THE FEDERAL GOVERNMENT TO REGULATE INTERSTATE NAVIGATION IN THE STREAM WHERE THERE IS NO SUCH NAVIGATION NOW IN SAID STREAM AND NO REASONABLE POSSIBILITY THAT THERE EVER WILL BE ANY SUCH NAVIGATION THEREIN TO REGULATE.

Petitioner's main claim to jurisdiction over the New River project is based on a contention that about sixty or more years ago a few adventurous mountaineers occasionally manoeuvered small flat boats up and down the stream to such an extent as to establish as a fact that at that time, at least, it was a stream navigable in interstate commerce, and that having once acquired that status it retains same until there has been specific action by Congress abandoning it as such. The concurrent findings by the two lower courts, that the facts shown by the evidence do not sustain the petitioner's contention, would, under the rule here applicable, seem to render this question of

the legal effect of such ancient navigation, if it had existed, unimportant in this particular case. But there are many other valuable mountain streams in Virginia (as well, perhaps, as in other states) which, unlike New River, were actually used in navigation, with the artificial aid of locks and dams, and which might be considered now as navigable waters of the United States, if the Federal Power Commission's position should be sustained. Navigation in such other streams was practicable in those early days only because there were no highways or other available means of transportation. With the advent of the railroads and the construction and improvement of highways, navigation in these rivers ceased, even long before the coming of motor vehicles. It is quite certain that these other rivers will never be used again for navigation purposes, and cannot possibly be used in the accustomed mode of transportation by water. Yet the Power Commission contends that it possesses plenary jurisdiction over all power projects which Virginia may desire to build, or license the building of, in these streams.

In support of this contention petitioner relies on the decision of this Court in *Economy Light and Power Company* v. *United States,* 256 U. S. 113. An analysis of the case, however, and of the questions actually involved therein, clearly shows that it does not support petitioner's position, though it is true that certain expressions in the opinion, lifted from their setting and context, lend color to petitioner's contentions. It was a suit instituted by the United States under the Rivers and Harbors Act of March 3, 1899,

to restrain the construction of a dam, not authorized by the State of Illinois, or by the War Department, in the Desplaines River. The case turned upon the question whether the river was a "navigable water of the United States," within the meaning of said act. There was no contention that there had been any actual navigation in the river since about 1820, or a period of about a hundred years. The issue of fact was whether in its natural state the stream was navigable in interstate commerce during the years 1787 to 1804. The reason the inquiry related to those long past years was because it was found by the lower courts that, due to artificial diversions of water from the stream and artificial obstructions, such as dams and bridges, the river was not navigable in its condition existing at the time of the suit, but that, if it was navigable in its natural state during the years 1787 to 1804, the river acquired then a status as a "navigable water of the United States," and *this status was preserved by special acts of Congress* relating to the then territories in the Northwest, from which the States of Indiana, Illinois and others were carved. The opinion of the Circuit Court of Appeals points out that it had been previously held in the *Montello Case*, 20 Wall. 430, 444, that to preserve the natural character of all these rivers leading into the Mississippi and St. Lawrence was the purpose of the Ordinance of 1787 declaring them to be free to the public. That opinion also quotes section 9 of the Act of Congress of May 18, 1796, as follows: "And be it further enacted that all navigable rivers within the territory to be disposed of by this Act shall be

deemed to be and remain public highways," and also section 6 of the Act of Congress of March 26, 1804: "That all navigable rivers, creeks and waters, within the Indiana Territory, shall be deemed to be and remain public highways." And the Circuit Court further said:

> "The trial judge found, as the record shows, that there is no evidence of actual navigation within the memory of living men, and therefore there would be no present interference with navigation by the building of the proposed dam. But it was held that the evidence shows the Desplaines *a navigable water of the United States, preserved as such by the legislation of Congress.*" (Italics supplied. 256 Fed. 798.)

And the Circuit Court of Appeals, after discussing the legal tests of navigability to be applied to determine whether the Des Plaines was a navigable water of the United States in the period 1787-1804, stated its conclusions as follows:

> "Under these authorities it seems clear that the Desplaines river, having been used as an interstate highway of commerce from 1673 to 1825 in the only kind of commerce then existing, is to be deemed of navigable capacity and *a navigable stream within the Ordinance of* 1787 *and the acts of Congress of May* 18, 1796, *and March* 26, 1804, by which Congress specifically took jurisdiction over navigable streams and *declared that they should forever remain public highways.*

* * *" (Italics supplied. *Economy Light and Power Company,* 256 Fed. 792, 804.)

On the appeal to this Court, the opinion of Mr. Justice Pitney reviewed these acts of Congress and said:

> "There can be no doubt that the waters of the Chicago-Des Plaines-Illinois route 'and the carrying places between the same' constituted one of the routes of commerce intended by the ordinance, and the subsequent acts referred to, to be maintained as common highways. It did not make them navigable in law unless they were navigable in fact, but declared the public rights therein so far as they were navigable in fact; * * *" (256 U. S. at p. 120.)

And the opinion further points out (p. 123) "that the Ordinance of 1787 recognized 'carrying places' as a part of a navigable waterway."

The opinion then states the Court's conclusion:

> "We concur in the opinion of the circuit court of appeals that a river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, is *within the power of Congress to preserve for purposes of future transportation,* even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of

artificial obstructions. * * *" (Italics supplied. 256 U. S. at p. 123.)

Petitioner evidently relies on what is said later in the same paragraph of the opinion:

"The Des Plaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation, or increased cost in other methods of transportation, may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition, and require only the exertion of Federal control to make them again important avenues of commerce among the states. *If they are to be abandoned, it is for Congress, not the courts, so to declare.* The policy of Congress is clearly evidenced in the Act of 1899, and, in the present case at least, nothing remains but to give effect to it." (Italics supplied: 256 U. S. at p. 124.)

This Court concurred in the opinion of the Circuit

Court of Appeals, which held, as above quoted, that the Desplaines River's status as a navigable water of the United States *was preserved by the provisions of the Acts of* 1796 *and* 1804, which Acts related only to the Northwest territory. The portion of the opinion of this Court last quoted, petitioner contends was meant to apply, not specifically to the Desplaines River, and "many other streams in like condition" in the Northwest territory covered by the 1796 and 1804 Acts, which were the only streams under consideration by this Court, but that this Court intended to hold that every stream in every State in which interstate navigation ever was conducted, is perpetually within the jurisdiction of Congress to regulate navigation, though all navigation has been abandoned for generations.

But if it had been the intention of this Court to hold that a stream's navigable status was preserved under the common law, there would have been no reason to refer to or adjudicate the effect of the 1796 and 1804 Acts at all. Such Acts would have been wholly unnecessary to preserve the navigable status of the Desplaines River. The statement in the opinion with reference to the rivers under consideration that "If they are to be abandoned, it is for Congress, not the Courts so to declare," obviously was intended to apply only to those streams the status of which had been *preserved by Congress.* This Court was merely saying, in effect, "Congress has preserved the status of these rivers; if that status is to be abandoned, it is for Congress not the Courts so to declare."

It is inconceivable that this Court could have in-

tended to hold that it lay within the power of a few adventurous mountaineer boatmen, by manipulating their crude craft in New River, to impose upon that turbulent stream a paramount servitude in favor of interstate navigation, for which it was never suitable, and deprive the States of the power to use the stream for generating electrical energy, to which it is ideally adapted.

Nor does the opinion in this case furnish any basis for the Power Commission's contention as to rivers like the James in Virginia, which has not been navigable above tidewater at Richmond for over half a century, that the Rivers and Harbors Act and the Federal Power Act are to be given retroactive effect so as to perpetually preserve said rivers as subject to the jurisdiction of the Federal Government to regulate navigation, when there is not, will not and cannot be any navigation therein to regulate. Such a jurisdiction over imaginary but non-existent and impossible navigation can be but a legal fiction, and, where it serves no useful purpose, but operates only to throttle the States in the development of their water powers, it is a most harmful fiction, and one which, Virginia earnestly submits, this Court will not invoke. It could just as logically be applied to every mountain path or old mud road over which interstate transportation of persons or commodities ever was carried on.

Obviously fictions should not be made the basis of determining the constitutionality of the exercise of governmental powers. As said by Mr. Justice Black, in referring to the feudal fiction of complete owner-

ship of the whole by each of two tenants by the entirety:

> "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions." (*United States* v. *Jacobs*, 306 U. S. 363, 369.)

III.

THE FEDERAL GOVERNMENT'S POWER TO PROTECT NAVIGABLE WATERS IN INTERSTATE NAVIGABLE STREAMS IS ITSELF IMPLIED FROM THE POWER TO REGULATE INTERSTATE COMMERCE, AND IT CANNOT BE MADE THE BASIS OF INFERRING ANY ADDITIONAL REGULATORY POWER, THE EXERCISE OF WHICH DOES NOT CONSTITUTE A REGULATION OF INTERSTATE COMMERCE.

Petitioner argues that because the Federal Government has the implied power to protect navigable waters from harmful obstructions, and to prohibit the erection of such structures in such waters, it has the further power to attach to its consent not to prohibit a harmless structure from being built, license conditions that amount to a regulation of intrastate business. The obvious result of the argument is the implication of a power, not within the Commerce Clause, from said power to prohibit, which itself is inferred from the Commerce Clause.

It is an accepted maxim of the law, with respect to the implication of powers, that "a stream cannot rise higher than its source." The source of the power is the Commerce Clause, which is restricted to inter-

state commerce, but petitioner would have the "stream" of inferred powers rise so high as to embrace intrastate matters not within the Commerce Clause. Petitioner's contention that inferences may be built on inferences in this manner furnishes an ideal illustration of the evil cautioned against by Mr. Justice Frankfurter in his dissenting opinion in *Texas* v. *Florida*, 306 U. S. 398, 434, when he said:

> "But legal doctrines have, in an odd kind of way, the faculty of self generating extension."

It is quite obvious that a continued application of the principle of inferring new powers from powers themselves inferred would lead to ultimate powers having no more connection with the power to regulate interstate commerce than the "cow with the crumpled horn" of Mother Goose fables had with the "house that Jack built."

IV.

REGULATION OF THE MANUFACTURE OF ELECTRIC ENERGY IN THE MANNER PROVIDED FOR BY THE FEDERAL POWER ACT IS NOT A REGULATION OF INTERSTATE COMMERCE, AND THE EXERCISE OF ANY SUCH POWER BY THE FEDERAL GOVERNMENT, OVER THE PROTEST OF THE STATE IN WHICH THE PLANT IS LOCATED, IF SUSTAINED UNDER THE COMMERCE CLAUSE, WOULD AMOUNT TO A DESTRUCTION OF THE DUAL SYSTEM OF AMERICAN GOVERNMENT AS ESTABLISHED BY, AND IN VIOLATION OF, THE UNITED STATES CONSTITUTION.

The Federal Power Commission asserts its jurisdiction to control and regulate, not only the construction of a waterpower project affecting interstate navigation in so far as it affects stream flow (which Vir-

ginia concedes), but all other details of the project, even though having no possible relation to navigation. One of the grounds it relies on is that every plant which sends its products into interstate commerce is a business "affecting interstate commerce" and for that reason the Federal Government has jurisdiction to regulate it down to the smallest details of plant construction and operation. Petitioner does not dispute the fact that the decisions of this Court have uniformly established that the business of manufacturing lies within the field of exclusive State regulatory power; *Cornell* v. *Coyne,* 192 U. S. 418; that the mere fact that the product moves in interstate commerce is immaterial, since "commerce succeeds to manufacture and is not a part of it," *United States* v. *E. C. Knight Company,* 156 U. S. 1, 12; and that the generation of electrical energy is manufacturing within this principle and is not a part of interstate commerce, *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 181; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U. S. 604, 611. But petitioner, in effect, requests this Court to overrule these decisions and so readjust the fields of Federal and State regulatory jurisdiction as to transfer to the Federal field plenary power to completely regulate any manufacturing business the products of which, in whole or in part, move in interstate commerce. The manufacture of any such product, petitioner, in effect argues, *affects* interstate commerce, and the Federal Government may fully regulate anything *affecting* same.

The far-reaching effect of transferring to the fed-

eral field of regulatory jurisdiction every business, manufacturing or otherwise, which remotely affects interstate commerce is obvious. The owner of a vegetable garden or a person raising domestic fowls this principle would bring within the federal jurisdiction because the effect of raising these products for the owner's consumption would be, to that extent, to lessen the demand for such commodities brought into the State, or increase the quantities sent out into other states. If the jurisdiction of the Federal Government under the Commerce Clause is to be determined and tested purely on theory, there is no limitation to the extent to which it may be carried by extending it to every act *affecting* interstate commerce, and the obvious result would be the destruction of the functions of the states in the regulatory field. That any such result as this is clearly in violation of the fundamental principles of our dual system of government is recognized in all of the decisions of this Court. See the recent *Schecter case,* 295 U. S. 495, 546. The rule is clearly established that the affirmative, direct and positive regulatory powers of the Federal Government are confined to those acts, matters and transactions which actually constitute a part of the stream and flow of interstate commerce and do not embrace matters merely *affecting* such commerce. In addition to this direct, positive regulatory power over interstate commerce itself, however, this Court has recognized the power of Congress to *Protect* interstate commerce when there is a direct and substantial *threat of injury* to it by exercising a *negative*

protective regulatory power over matters which are themselves wholly intrastate. In order to justify the exercise of this protective power, however, this Court has emphasized that "the justification for the exercise of federal power should clearly appear". *Florida* v. *United States,* 282 U. S. 211; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. In the latter case, this Court said:

> "* * * Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *A. L. A. Schecter Poultry Corp.* v. *United States, supra.* Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. As the Court said in *Board of Trade* v. *Olsen, supra* (262 U. S. p. 37, 67 L. ed. 850), repeating what had been said in *Stafford* v. *Wallace,* 258 U. S. 495, 66 L. ed. 735, *supra*: 'Whatever amounts to more

or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it.' " (81 L. ed. 893, 911-2.)

The case of *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, involved the question of the regulatory power of the National Labor Relations Board over the business of the Consolidated Edison Company and its relations to its employees. The Edison Company did exclusively an intrastate business, but the jurisdicton of the Labor Relatons Board was sustained as the exercise of a federal power to *protect* interstate railroads and other large interstate businesses *from the injury* which would follow should the operations of the Edison Company be interrupted by threatened labor difficulties or strikes. The character of the regulatory power which was being exercised is shown from the following statement of Mr. Justice Reed, concurring in part:

> "It is agreed that the 'fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife.' * * *" (305 U. S. 197, 245, 83 L. ed. 148.)

Even so ardent an advocate of the centralization of federal power as Chief Justice Marshall said in *McCullough* v. *Maryland,* 4th Wheat. 316, 403:

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one mass."

The principles contended for by petitioner would sustain the exercise of the direct regulatory power over intrastate business and obviously would produce this disasterous result. Petitioner does not even contend that the power it seeks to exercise is for the purpose of protecting interstate commerce from threatened injury. In fact, it is impossible to conceive of any greater threat to interstate commerce from the generation of electricity in a hydro-electric plant than in a steam plant except, of course, regulation of stream flow.

Aside from the power conferred by the Act upon the Federal Commission to exercise regulatory control over the stream flow in order to protect navigation or navigable waters from obstruction or injury, it is not contended by petitioner that the other regulatory powers embraced within the terms of the Federal license have any relation to navigation or the protection of navigable waters. The petitioner argues, however, that the Federal Government possesses the power to arbitrarily forbid the construction of any plant in navigable waters, and the failure to exercise this protective power, or the decision of the Federal Government not to exercise same, operates as a legal permit or license that same may be constructed. The further argument is then advanced that from this power to prevent the construction is implied the fur-

ther power to embrace in the so-called license or permit any and every regulatory provision which the Federal Government may desire to exercise over the project, its construction and operation, even though same has no relation to stream flow or to the protection of navigation or navigable waters.

It is clear, however, that the decisions of this Court have established the principle that the Federal Government's jurisdiction and powers over navigable waters are restricted entirely to the regulation of navigation and the protection of such waters from harmful obstructions, and that, while the stream is subject to the servitude in favor of navigation and interstate commerce, the states themselves possess all other governmental jurisdiction over said streams. Thus, in the case of *James* v. *Dravo Contracting Company*, 302 U. S. 134, 140, this Court held West Virginia's ownership of the bed of the Kanawha and Ohio Rivers, *which are navigable waters of the United States*, "was subject to the power of Congress to use the lands under the streams 'for any structure which the *interest of navigation* in its judgment may require'." (Italics supplied.) And the court further held that the actual occupancy of the bed of the stream by the United States for the construction of a dam *in the interest of navigation* did not operate to vest title to the lands in the United States, "But as the occupation was simply the exercise of the dominant right of the Federal Government (*Gibson* v. *United States, supra*, 276) the servient title continued as before. * * * The Solicitor General conceded in his argument at bar that *the State of West Virginia retained its territorial*

jurisdiction over the river beds and we are of the opinion that this is the correct view." (Italics supplied.)

The exercise of the Federal Government's protective power, under the decisions of this Court, may not be used in such a manner as to invade the general field of the reserve powers of the states. To extend this protective negative power to the extent of the positive affirmative regulation of an intrastate activity would be in clear violation of the principles established in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* above quoted from.

This Court has never held that the Federal Government possesses the power to prohibit structures in navigable waters of the United States *which are not hurtful or harmful to the navigable capacity of such waters, or to navigation therein.* The only power of the Federal Government over such harmless structures is that of deciding whether they are in fact harmless. Once it has been decided that they are not hurtful or harmful to navigation or the capacity of navigable waters, there is no legitimate power in the Federal Government to prevent the construction of same. It would be an obvious abuse of the Federal Government's power to decide this question, to exact, as a condition to a favorable decision, *the additional power to regulate matters in no way related to navigation or the protection of such waters.*

What has been said above with respect to the use of the power to decide whether a proposed structure is

harmful to navigation or navigable waters applies equally to petitioner's argument that the alleged power of the Federal Government to prohibit the sending of the electrical energy into other States justifies exacting, as the price of permitting same, the right to exercise powers over intrastate commerce and other matters local to Virginia. It is clear that the employment of the power to exclude matter from interstate commerce, such as lottery tickets and harmful commodities, is an exercise of *protective* regulatory powers of Congress, and cannot be applied arbitrarily, and, while there may be differences of opinion whether the exclusion is in reality a bona fide exercise of the power to regulate commerce, as was held not to be the case in *Hammer* v. *Dagenhart,* 247 U. S. 261, yet the principle itself is well established, as stated in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, that "The Congress may not 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government.' Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423. The Government's argument recognizes this essential limitation." (297 U. S. 326.)

Petitioner has not pointed out anything in interstate commerce which needs protection from, or would be protected by, the excluding of this electrical energy from such commerce.

But this Court has expressly and emphatically decided against petitioner's contentions that Congress may impose conditions on the right to engage in inter-

state commerce and has stated the reasons therefor so logically and convincingly that there can be no doubt as to the correctness of the conclusion reached. In *Howard* v. *Illinois Central Railroad,* 207 U. S. 463, 502 (*Employer's Liability* Cases), Mr. Chief Justice White said:

> "3. It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliter-

ate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endues." (207 U. S. at p. 502.)

It is further worthy of note that the powers exercised by the Federal Government in the *Ashwander* case, *supra,* related to properties over which the government had acquired full title to the dam site with all riparian rights. Respondent seeks to sustain the validity of the regulatory provisions of the Federal license, and their application to Virginia owned properties, upon the ground that rivers running through two or more states constitute *"National Resources,"* and that the license provisions which extend beyond the protection of navigation are intended to assure conservation and regulation of such *"National Resources."* No authority whatever is cited to sustain the proposition that the properties in streams of this type are national resources, nor is any notice taken by petitioner of the many decisions of this Court to the contrary. In the recent case of *Hinderlider* v. *LaPlata River Company,* 304 U. S. 92, this Court clearly held, in an opinion delivered by Mr. Justice Brandeis, that the property rights in such streams belong exclusively to the States through which they run, and that the several States interested may by compact entered into, with the consent of Congress, settle and determine between themselves the nature

and extent of their respective rights therein. In the event that the States interested in the LaPlata River involved in that suit had not been able to agree upon their respective rights, the opinion points out that, "The extent of the existing equitable right of Colorado and of New Mexico in the LaPlata River could obviously have been determined by a suit in this Court, as was done in *Kansas* v. *Colorado,* 206 U. S. 45, 51, in respect to the rights in the Arkansas River and in *Wyoming* v. *Colorado,* 259 U. S. 419, in respect to the Laramie." (304 U. S. 104-5.) And this Court further held that the fact that such a compact is assented to by Congress does not render the same a "treaty or statute of the United States." *Id.* page 109.

It is clear, therefore, that the property rights and governmental control over streams, except in so far as such control relates to navigation and the protection of navigable waters, reside in the States, and these property rights can be converted into so-called "National Resources" only by the granting by the States of the said property rights so held, or by constitutional amendment.

The petitioner seeks to link the regulatory powers vested in the Federal Commission with possible future flood control activities of the Federal Government. However, the Federal Water Power Act contains not a word of flood control, and the regulatory powers conferred on the Commission, except in so far as they relate to the control of stream flow for the protection of navigation, *have no more relation to flood control than they do to navigation.* Furthermore, while Sec-

tion 10(c) of the act empowers the Power Commission to regulate the operation of the plant so "as not to impair navigation," there is no word authorizing regulation of the operation so as to avoid floods. If there were such provisions, they would constitute an obviously unconstitutional appropriation of the State's properties for a purpose not within the commerce clause or any other delegated power. The petitioner's argument in its final analysis is that these streams flowing through two or more States have by some magical development of the Constitution become burdened with a federal servitude to flood control in addition to the servitude for navigation. The argument would seem to be that States must refrain from any development of the latent water powers in their rivers, should the Federal Commission so decide, on the chance that Congress might see fit at some distant date to inaugurate a program of flood control, and that such developments as are made must be operated not primarily to develop electrical energy, but that this purpose must be subordinated to flood control. There would be few, if any, developments of these streams under such imposed conditions, and in the meantime this latent water power must be allowed to go to waste and the States are powerless to prevent it, so petitioner claims. This plan advocated by the Federal Commission, it characterizes as a program of *conservation of resources.* On the contrary, it is in reality a program for the *wasting* of the water resources of the States because nothing is truer than the old maxim, "The mill will never grind again with water that is passed."

It is utterly inconsistent with the petitioner's argument that the regulatory powers sought to be exercised by the Power Commission in this case, which have no relation to controlling the flow of a stream, could possibly affect flood control. Said Commission has already approved the project, and has tendered a license with the objectionable regulatory provisions in addition to retaining the power to regulate the stream flow for the protection of navigation. This latter power neither Virginia nor the respondent has objected to.

The petitioner argues that streams of this nature constitute national problems and that it is necessary for the Federal Government to preempt the property rights and governmental regulatory powers of the States over their streams in order to protect other States from flood damage. In view of this contention, it is quite remarkable that forty-one of the forty-eight States of the Union have joined in filing briefs in this Court protesting against the taking of their jurisdiction and property rights to provide this Federal "protection". In fact, there is no more desire manifested on the part of the States for this "protection" than was indicated by the governments of Belgium, Norway and Denmark for their "protection" by Hitler from the government of the British Empire.

It is further true that many rivers which would come within the Power Commission's views as to what are navigable streams, such as the James River in Virginia, flow directly into the sea and do not traverse any other State. Nevertheless, if they were

navigable waters, they would be within the jurisdiction of the Federal Power Commission and no element of "protecting" other States from flood damage could possibly enter into the control which said commission would seek to exercise over a stream of this type. It is clear, therefore, that the Act itself does not contemplate any such flood control activity as the basis for the exercise of the regulatory powers here objected to.

Petitioner argues that the Federal Government could itself construct a project in aid of navigation and flood control, and, therefore, it may properly regulate any structure erected by private individuals which could possibly be utilized for that purpose by the Federal Government. However, if the Federal Government erected such a structure, it would be necessary to acquire the property rights involved and erect thereon a structure, at its own expense. This is an essentially different activity from undertaking to dedicate and, in effect to confiscate, the properties of the States, without their consent, to such a purpose. It is equally true that the Federal Government may acquire lands for the purpose of constructing forts, arsenals, post offices, and other needful Federal buildings within the States, but this certainly cannot be construed as empowering the Federal Government to regulate any structure whatsoever, erected on any lands which might be suitable for any one of those purposes. In so far as the regulation of navigation, and other activities in interstate commerce is involved, the Federal Government possesses exactly

the same power on land as on water. In the case of *United States* v. *Coombs,* 12 Peters (U. S.) 72, 78, 9 L. ed. 1004, 1007, referring to the jurisdiction of Congress to exercise the power to regulate navigation and commerce, this Court said:

> "It does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the States.'"

It is clear, therefore, that the fact that the project here involved has been constructed in a river in no way increases the regulatory jurisdication of the Federal Government with respect to same.

Furthermore, the mere fact that the stream may traverse two or more States does not convert the problem into a national one. It is on the contrary one which the States can, and here evidence a desire to, control through compacts in cases where an agreement can be reached, or have their rights adjudicated by this Court where same is necessary.

V.

THE PROVISIONS OF THE FEDERAL POWER ACT WHICH AUTHORIZE THE FEDERAL GOVERNMENT TO TAKE OVER THE PROPERTY OF VIRGINIA, CONSISTING OF THE BED OF THE RIVER AND THE USUFRUCT OF THE STREAM FLOW, WITHOUT COMPENSATION TO THE STATE, VIOLATE ATRICLE 4, SECTION 3, CLAUSE 2, AS WELL AS THE FIFTH AMENDMENT OF THE CONSTITUTION.

The Federal Power Commission is empowered by the Act to exercise such complete control over a water power project as to bring about, through compelling the setting aside of amortization reserves, the absolute ownership of same by the Federal Government at the expiration of the term of the Commission's lease, without any cost whatever or any payment therefor. The Act, therefore, obviously contemplates that the Federal Government will "capture" the bed of the stream and usufruct of the stream flow, which are the property of Virginia, without any compensation to Virginia therefor, and without condemnation or other legal proceedings therefor. "* * * The water power, the right to convert it into the electrical energy thus produced, constitute property * * *." *Ashwander* v. *United States,* 297 U. S. 288, 330.

Property of a State or its political subdivisions already devoted to a public use, *i.e.,* highway purposes, was held by the Court of Claims to constitute "private property" within the meaning of the Fifth Amendment and when taken by the United States compensation must be made therefor. 53 Ct. Cl. 417. This decision was affirmed in a *per curiam* memo-

randum by this Court. *United States* v. *Wayne County, Kentucky,* 252 U. S. 574. See also to the same effect, *Town of Bedford* v. *United States* (C. C. A. Mass.), 23 Fed. (2d) 453; *United States* v. *Wheeler Township* (C. C. A. Minn.), 66 Fed. (2d) 977.

The taking of Virginia's property, without compensation, as the Federal Power Commission insists here it is empowered by the Act to do and intends to do, would be a clear violation of the compensation clause of the Fifth Amendment.

The said taking would also violate the property clause (Article 4, Section 3, Clause 2), the last sentence of which provides that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular state." Petitioner's contention that the Commerce Clause should be so construed as not only to prejudice, but to completely extinguish, Virginia's claims to ownership of the bed of the stream and the usufruct of the stream flow, clearly violates the above quoted provision of the Constitution.

But, aside from these *prohibitions* against the taking of Virginia's property, there is no *affirmative* grant in the Constitution to the Federal Government of any *power* to take same. Neither the Commerce Clause, nor any newly conceived source of Federal power, such as is advanced by petitioner, that interstate rivers are a "National Problem," can possibly be held to justify any such taking.

VI.

EVEN IF THE FEDERAL GOVERNMENT HAD THE POWER TO REGULATE THE MANUFACTURE OF ELECTRICAL ENERGY, THE PROPOSED FEDERAL REGULATION OF THE CONSTRUCTION AND OPERATION OF HYDRO-ELECTRIC GENERATING PLANTS, WHERE THERE IS NO SUCH REGULATION OF PLANTS OPERATED BY STEAM, IS ARBITRARY AND UNREASONABLE, IS NOT BASED ON ANY PROPER CLASSIFICATION, AND WOULD RESULT IN NEEDLESSLY CONFUSING THE EFFORTS OF VIRGINIA TO REGULATE THE INDUSTRY AS A WHOLE.

Regulatory legislation of Congress, under the Commerce Clause, must not be arbitrary or unreasonable in imposing burdensome requirements or it will be lacking in due process; although, when the State does not appear to protest against same, the existence of facts affording a rational basis for the regulation is to be presumed, unless facts proven or known to exist preclude such presumption. *United States v. Carolene Products Company,* 304 U. S. 144, 152-4. But, where the State does appear to protest against such legislation as an invasion of its field of domestic regulation, such a presumption will not be raised, as Virginia has endeavored to show in the discussion of Point I, *supra.*

The complete regulation of hydro-electric plants, which the Federal Power Commission seeks to establish here as within its jurisdiction, while the regulation of carbo-electric plants is left to the States, furnishes an excellent example of the confusion which must result in attempts to impose complete uniform Federal regulation of any type of manufacturing activity within the several States, and proves the

wisdom of the framers of the Constitution in preserving local control over these local matters. If the asserted jurisdiction of the Power Commission were sustained, we would have in Virginia a situation in which the Virginia Commission would be charged with the responsibility of fixing intrastate rates for the licensee's entire output of electrical energy, including that of its steam plants, all of which would be fed into one distribution system. The Federal Commission would be engaged at the same time in regulating the type of construction and maintenance, the setting aside of amortization reserves and various other features relating to the generation of part of the power. It is obvious that the Virginia Commission would be confronted with many perplexing problems, such as the basis of valuation for rate making purposes to be applied to the two types of plants, the weight to be given the Federal Commission's valuations, if any are made, the allocations to the respective plants of the distribution costs and of the value of the energy supplied by them at different times of the year and at different hours of the day or night, with correspondingly different effects, because of daily peak loads, seasonal demands, etc., upon the prices realized by the licensee therefor; the burdensome effect, if any, which the Federal Commission's regulatory actions may have on other units of the licensee's system; the disparity between values assessed for purposes of local taxation and those fixed by the Federal Commission. These and many other problems would seriously hamper and obstruct, if not completely nullify, Virginia's efforts at intel-

ligent and reasonable regulation of her electric power utilities. Obviously, too, these problems present a most discouraging picture to prospective developers of Virginia's streams.

It seems manifest that any *uniform* licensing system which would apply alike to such projects in every navigable stream must be arbitrary on its face. Some sites in some streams, by virtue of the volume of flow and the extent of the fall, may be sufficiently valuable to carry the burdens imposed by the Federal Power Act, while others obviously are not. These latter, if the petitioner's contentions are sustained, must remain undeveloped, and their latent powers the State will be compelled to permit to go to waste. It is difficult to perceive how, upon analysis, the Federal Power Act can be termed a "conservation" measure, when the real effect is to compel *the consumption of coal,* a nonperishable natural resource, and the *wasting of water* power, which cannot be preserved after the water has passed over the power site.

It is earnestly submitted, therefore, that, even if the Federal Government had the power to regulate the generation of electrical energy, the mere fact that some hydro-electric plants are constructed in navigable waters, where the operation of the plant will not injuriously affect navigation or the navigable capacity of said waters, furnishes no rational basis for imposing thereon burdensome regulatory requirements which have no relation to navigation or said navigable capacity, but which serve only to place such plant at a distinct competitive disadvantage in contrast with carbo-electric plants.

VII.

VIRGINIA IS ENTITLED TO A DECISION NOW ON THE CONSTITUTIONALITY OF THE CAPTURE CLAUSE, AS WELL AS THE OTHER LICENSE PROVISIONS OF THE ACT, SO AS TO ENABLE HER TO PROCEED WITH THE DEVELOPMENT OF HER MANY VALUABLE STREAMS.

In addition to New River, Virginia owns many streams which are susceptible of valuable water power development, but neither the State herself, nor private investors would be likely to embark upon such an enterprise in view of the doubts and uncertainties which flow from the Federal Water Power Act. Doubtless a similar situation exists in all of the States having similar streams.

While the cloud cast by the Water Power Act and the assertions of jurisdiction thereunder made by the Federal Power Commission would doubtless not be sufficient alone to constitute a justiciable controversy, nevertheless, the constitutional validity of the objectionable regulatory provisions contained in said act are directly raised by the pleadings in this case and are squarely presented to the Court for decision. The Federal Commission itself is being greatly embarrassed by the uncertainties of the present situation, as appears from the statement of the Solicitor General filed April 5, 1940, in opposition to the continuance of this case, where it is said:

> "The Commission informs us that something over half of the 200 largest hydroelectric plants are now operated without a license from the Commission."

As heretofore pointed out, the obstruction of the development of water power is not only not a conservation of natural resources, but results in a needless waste of valuable energies which are daily being dissipated with the passage of the waters over desirable dam sites. Virginia should be free to encourage the utilization of the energies latent in these waters, and thereby conserve valuable coal deposits which are being inexcusably exhausted to generate the electrical energy which could readily be secured from these streams.

An effort was made by the State of New Jersey, within a brief time after the passage of the Federal Power Act, to have same declared unconstitutional by this Court on the ground that its provisions constituted an obstruction of the development by the State of its water power, but this Court held that there was no allegation or fact that the State was about to engage in the development of such power, or that the Federal Power Commission intended to apply the Act in such a way as to encroach upon the State's property rights, and, therefore, that the question was a moot one and this Court was without jurisdiction to entertain the bill. (*New Jersey* v. *Sargent*, 269 U. S. 328.) Since that time a number of attempts have been made to secure a final determination of the status of the various streams in the respective States, but without success. That this confusion exists and has existed for many years is attested by the remarks of Representative Cordell Hull of Tennessee, with reference to his bill

to amend the Federal Water Power Act, in which he said:

"It was in these circumstances that an earnest and hurried effort was put forth with the object of bringing about an improved and more desirable power policy on the part of the Federal Government. The Federal water power act of 1920 was the outcome. The States having defaulted for generations, and most of them having no laws or agencies for carrying out their functions and preserving their rights, the natural result was that most of the laws, regulations, and practises relating to water power and its development were inserted indiscriminately and in mass in the Federal water power act. No serious attempt was made to classify and set forth the respective rights, functions, and duties of the Federal Government and the States. The assumption seemed to be that since the States were wholly inactive, and since water power development should not be longer delayed, the Federal Government, willingly in some instances and unwillingly in others, felt justified in assuming *at least for the time being* the authority to perform all needful functions —*both State and Federal*—pertaining to the supervision and control of water power development.

"During the years that have followed *a few of the States have awakened and endeavored to assert some of their responsibilities and*

rights. The fact that the Federal power act, as stated, *blended and confused State and Federal functions and rights,* has greatly complicated the general movement of water power development. Misunderstanding and controversy relating to the construction of Federal water power law, and especially to the problem of just what constitutes the responsibilities and functions of the States, *has tended to slow down and handicap* the most important steps and efforts to carry forward our system of power development." (Cong. Rec. Vol. 70, Pt. 1, p. 996) (Dec. 21, 1928). (Italics supplied.)

The petitioner has, for some reason not understandable to Virginia, requested this Court to defer decision upon the question of the constitutionality of the capture clause which would authorize the taking over by the Federal Government, without compensation, of the property rights of the several States in their respective streams. It is obvious that, if this question is allowed to remain undecided *until the expiration of the fifty year license period,* as petitioner requests, the result will be a most serious and utterly unnecessary obstruction to the development of the water power, not only of Virginia, but of the other States as well.

For these and other obvious reasons, therefore, Virginia earnestly asks and insists that all these constitutional questions which are obstructing the development of her natural water power resources may be decided by this Honorable Court in this case.

CONCLUSION

It is submitted that the concurrent decisions of the courts below should be affirmed upon the ground that the regulatory provisions having no relation to controlling the flow of the stream so as not to impair navigation, are unconstitutional as constituting an invasion of the regulatory field reserved to the States.

In the event, however, that the Court should determine that said provisions are within the regulatory field of the Federal Government, the decisions below should nevertheless be affirmed, upon the grounds stated in the opinions of said courts, that the project is not constructed in waters navigable in interstate commerce, and that the operation of same will not have any substantial effect upon any such waters or upon interstate commerce.

Respectfully submitted,

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